IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

VIRNETX, INC., ET AL)
)
) DOCKET NO. 6:10cv417
-vs-)
) Tyler, Texas
) 2:41 p.m.
APPLE INC. September 30, 2016

TRANSCRIPT OF JURY TRIAL
AFTERNOON SESSION
BEFORE THE HONORABLE W. ROBERT SCHROEDER III,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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P R O C E E D I N G S

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

On the -- the competing proposals on the prior art issue, Mr. Arovas, the one that was submitted on behalf of Apple, I'm sort of having a hard time understanding how there's been evidence introduced in -- in the case, testimony introduced in the case that relates to that clause or the argument that all aspects of the accused features are found in the prior art.

Can you help me with that?

MR. AROVAS: The attempt in the proposed instruction was to capture what a practicing the prior art defense is, which is to say that the accused product is the same as the prior art and then, therefore, it doesn't infringe. And so that's -- I mean, we don't believe that there is evidence they put in that there is a "practicing the prior art" defense or that the elements of the product match up with the prior art for the relevant elements of the claim.

But our concern was just to say a "practicing the prior art" defense -- or practicing the prior art is not a defense to the jury, is not going to be helpful to the jury because they're not going to know what that is.

Because in particularly in this case, Your Honor,

with no invalidity, the jury is not being instructed on really what the prior art is, what it, you know, means to have, you know, products or features that match the prior art. And so you'll just have this one line kind of standing out there, practicing the prior art is not a defense, and I can't imagine what they're going to do with that.

THE COURT: Mr. Curry, are you going to argue that?

MR. CURRY: May I --

THE COURT: You may.

MR. CURRY: Your Honor, seized and zeroed in on the exact clause that we had a problem with, and that's that all aspects of the accused function were found in the prior art.

Now, if you give that instruction, I guarantee what we'll hear Apple say is no, we admit the -- the FaceTime servers weren't in the prior art, but NATs were.

And in this way, it would perversely allow them to continue making their improper argument that NATs or NAT routers can't meet the anonymity requirement of the claims because NATs were in the prior art.

Throughout this whole trial they've been acting like that motion in limine on practicing the prior art didn't exist. We've been prejudiced by it. And I think what's appropriate at this point is an order from the Court that they're not to make that argument anymore, and especially in, I guess, at least --

THE COURT: We're talking about the instructions right now.

MR. CURRY: For the instruction, I think what's needed is a straightforward clear instruction of the law, which is correct, which is what VirnetX provided, and not something that defines what practicing the prior art is, and a way for them to exploit that instruction that they want to make the point that their arguments have somehow been valid.

MR. AROVAS: I -- I have no intent of referring to the instruction, Your Honor. We're not asking for the instruction. We think that the instruction actually creates issues in a case of no validity, no definition of prior art. And to just throw out, you know, this one line that really has no context or foundation for the jury.

So what we were attempting to do is at least if we're going to put that in, which we don't think should be necessary, is to say what that means to be -- have a practicing the prior art defense, and that was really the intent.

THE COURT: Well, I think you can still make that argument even -- even under the instruction as submitted by VirnetX.

I'm sorry?

MR. CURRY: If it's my turn?

THE COURT: Yes.

MR. CURRY: Prior art was given definition in the preliminary jury instructions so it's not like this is going to come completely out of context. It will -- the jury will understand based on the arguments that have been made in this case what the Court's instruction means. And ultimately, Your Honor, it is a straightforward, true, correct statement of law.

THE COURT: Okay. I'm going to -- I'm going to -- we're going to include the instruction as submitted by -- by the Plaintiff.

MR. CURRY: Thank you, Your Honor.

THE COURT: And then there is the issue of the non-infringing alternatives. I understand the parties had -- I think I ruled that that was not going to come in, but as I understand, the parties have made an agreement that the first part of that section is agreeable; is that right? I just want to make sure there's no confusion here.

MR. MIZZO: Absolutely, Your Honor.

Yes, Apple had made the proposal to include the instruction. VirnetX had originally objected and Your Honor had ruled that way. On the break, VirnetX had indicated that it would -- it would be agreeable to including those three sentences --

THE COURT: All right.

MR. MIZZO: -- with that modification of FaceTime

at the end.

THE COURT: Just want to clarify and make sure we're giving the right instruction.

All right. Give us five minutes and we'll be back out. We'll have the final instructions and -- and we'll start.

I think Mr. Summers has something he wants to say.

MR. SUMMERS: Thank you, Your Honor.

There is just one more issue about the wording of the new instruction that the Court put in for the one royalty per device. And before we broke for lunch, we weren't sure what the Court was going to do with that instruction. And depending on what the Court chooses we would need to make a record of what the Court ultimately --

THE COURT: We struck that second sentence.

MR. SUMMERS: Thank you, Your Honor.

THE COURT: Okay. We'll be back shortly.

COURT SECURITY OFFICER: All rise.

(Recess.)

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated.

Well, actually, I guess we're ready to have the jury brought in. So stay standing.

COURT SECURITY OFFICER: All rise.

(Jury in.)

THE COURT: Please be seated.

Okay. Ladies and Gentlemen of the Jury, you have now heard all of the evidence in the case, and I will now instruct you on the law that you must apply.

It is your duty to follow the law as I give it to you. On the other hand, you are the sole judges of the facts. Don't consider any statement that I may have made during the trial or make in these instructions as an indication that I have an opinion, any opinion, about the facts of the case.

After I instruct you on the law, as I suggested earlier, the attorneys will have an opportunity to make their closing arguments.

Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist you in understanding the evidence and what the parties' contentions are.

A verdict form has been prepared for you, and you will take this form with you into the jury room. When you have reached a unanimous agreement as to your verdict, you will have the foreperson fill in, date, and sign the form.

At the end of the instructions, I am going to take you through the verdict form before the parties begin their closing arguments.

You will answer each question -- there are two -- on the verdict form from the facts as you find them. You should not decide who should win and answer the questions accordingly.

A corporation and all other persons are equal before the law and must be treated as equals in a court of justice. With respect to each of the questions that are asked, your answers and your verdict must be unanimous.

In determining whether any fact has been proven in this case, you may, unless otherwise instructed, consider the testimony of all the witnesses, regardless of who may have called them, and all evidence received into evidence, regardless of who may have produced them.

As you will recall, at times during the trial it was necessary for the Court to talk with the lawyers here at the bench out of your hearing or by calling a recess. We met at the bench or when you were in the jury room because during trial sometimes things come up that do not involve the jury.

And you should not speculate about what was discussed during such time. You are the jurors, and you're the sole judges of the credibility of all the witnesses and the weight and the effect of all the evidence.

By the Court allowing testimony or other evidence to be introduced over the objection of an attorney, the Court did not indicate any opinion as to the weight or the effect

of such evidence.

In determining the weight to be given to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness false -- testified falsely concerning some important fact or whether there was evidence that some -- that at some other time the witness said or did something or failed to say or do something that was different from the testimony the witness gave before you during trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it because people may forget some things or remember other things inaccurately.

So if a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory. And the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

In deciding whether to accept or rely upon the testimony of any witness, you may also consider the bias of the witness.

Now, certain testimony in this case has been presented to you through deposition. A deposition is the sworn, recorded answers to questions asked to a witness in

advance of the trial.

Under some circumstances, if a witness cannot be present to testify from the witness stand, the witness testimony may be presented under oath in the form of a deposition.

Some time before this trial attorneys representing the parties in this case questioned this witness under oath. A court reporter was present and recorded the testimony.

This deposition testimony is entitled to the same consideration and is to be judged by you as to the credibility and weight and otherwise considered by you, insofar as possible, the same as if the witness had been present and had testified from the witness stand in the courtroom.

While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience.

In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in this case.

The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the

evidence you believe that single witness.

Now, there are two types of evidence that you may consider in properly finding the truth as to the facts in this case.

One is direct evidence, such as the testimony of an eyewitness.

The other is indirect or circumstantial evidence, which is the proof of a chain of circumstances that indicates the existence or non-existence of certain other facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from all of the evidence, both direct and circumstantial.

The parties have stipulated or agreed to some facts in this case. When the lawyers on both sides stipulate to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as proved.

It has been determined that VPN on Demand infringes Claims 1, 3, 7, and 8 of the '135 patent, as well as Claim 13 of the '151 patent. Just like stipulated facts, this instruction is binding, and you must regard it as proved.

However, VirnetX's infringement allegations as to the FaceTime system are contested, and you must determine whether those claims are infringed. You may not assume or

infer that the FaceTime system infringes simply because VPN on Demand infringes.

Therefore, whether or not the FaceTime system infringes, is a completely different issue for you to decide.

Attorneys representing clients in courts such as this one have an obligation in the course of the trial to assert objections when they believe testimony or evidence is being offered that is contrary to the Rules of Evidence.

The essence of a fair trial is that it be conducted pursuant to the Rules of Evidence and that your verdict be based only on legally admissible evidence.

So you should not be influenced by the objection or by my ruling on it.

If the objection was sustained, you should ignore the question. If the objection was overruled, then you may treat the answer to that question just as you would treat the answer to any other question.

When knowledge of a technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field is called an expert witness and is permitted to state his or her opinion on technical matters. However, you are not required to accept that opinion.

As with any other witness, it is up to you to decide whether the witness's testimony is believable or not,

whether it is supported by the evidence and whether to rely upon it.

In deciding whether to accept or rely upon the opinion of an expert witness, you may consider the bias or -- you may consider any bias of the witness.

I will first give you a summary of each side's contentions in this case. I will then tell you what each side must prove to win on these issues.

As I have mentioned, it's been determined that VPN on Demand infringes Claims 1, 3, 7, and 8 of the '135 patent, and Claim 13 of the '151 patent. The parties agree that VirnetX is entitled to damages for this infringement, but disagree on the amount of those damages.

The amount of damages for infringement of VPN on Demand is an issue you must decide. The parties dispute whether the FaceTime system infringes Claims 1, 2, 5, and 27 of the '504 patent and Claims 36, 47, and 51 of the '211 patent.

In response to VirnetX's infringement contentions, Apple contends that it has not infringed these claims. Because Apple contends that the FaceTime system does not infringe the asserted claims of the '504 and '211 patents, Apple contends that VirnetX is not entitled to damages for infringement of these claims.

As I told you at the beginning of this trial, in

any legal action facts must be proved by a required amount of evidence known as the burden of proof. The burden of proof in this case is on VirnetX. VirnetX has the burden of proving infringement and damages by a preponderance of the evidence.

Preponderance of the evidence means the evidence that persuades you that a claim is more likely true than not true. If the proof establishes that all parts of one of VirnetX's infringement claims are more likely true than not true, then you should find for VirnetX as to that claim.

In determining whether any fact has been proved by a preponderance of the evidence, you may, unless otherwise instructed, consider the stipulations, the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Before you can decide many of the issues in this case, you will need to understand the role of patent claims.

The patent claims are the numbered sentences at the end of each patent. The claims are important because it is the words of the claims that define what a patent covers.

The figures and text in the rest of the patent provide a description and/or examples of the invention and provide a context for the claims.

But it is the claims that define the breadth of the

patent's coverage. Each claim is effectively treated as if it were a separate patent, and each claim may cover more or less than another claim. Therefore, what a patent covers depends in turn on what each of its claims covers.

You will first need to understand what the asserted claims cover in order to decide whether or not there is infringement. The law says that it is the Court's role to define the terms of the claims, and it is your role to apply these definitions to the issues that you are asked to decide in this case.

Therefore, as I explained to you at the start of the case, the Court has determined the meaning of certain claim terms at issue in this case. And those definitions have been provided for you in your juror notebook.

You must accept the definitions of these words in the claims as being correct. It is your job to take these definitions and apply them to the issues that you are deciding, including infringement.

The claim language that has not been interpreted for you in your notebook is to be given its ordinary and accustomed meaning as understood by one of ordinary skill in the art.

I will now explain how a patent covers -- how a patent claim cover -- sorry.

I will now explain how a patent claim defines what

it covers. A claim sets forth in words a set of requirements.

Each claim sets forth its requirements in a single sentence. If a device or system satisfies each of these requirements, then it's covered by the claim.

In patent law, the requirements of the claim are often referred to as "claim elements" or "claim limitations."

When a thing such as a feature, product, process, or system meets all of the requirements of a claim, the claim is said to "cover" that thing and that thing is said to "fall" within the scope of that claim.

In other words, a claim covers a feature, product, process, or system where each of the claim elements or limitations is present in that feature, product, process, or system.

Conversely, if the feature, product, process, or system meets only some, but not all, of the claim elements or limitations, then that feature, product, process, or system is not covered by the claim.

This case involves two types of patent claims: Independent claims and independent claims.

An "independent claim" sets forth all of the requirements that must be met in order to be covered by that claim. Thus, it is not necessary to look at any other claim to determine what an independent claim covers. In this case,

for example, Claim 1 of the '504 patent is an independent claim.

Other claims in this case are "dependent claims." A dependent claim refers to another claim and includes all the requirements or parts of the claim to which it refers.

In this case, for example, Claim 2 of the '504 patent depends from Claim 1. In this way, the claim depends on another claim. The dependent claim then adds its own additional requirements.

To determine what a dependent claim covers, it is necessary to look at both the dependent claim and any other claims to which it refers. A product, feature, method, or system that meets all of the requirements of both the dependent claim and the claim to which it refers is covered by that dependent claim.

The beginning portion, or preamble, to some of the claims uses the word "comprising." "Comprising" and "comprises" means "including but not limited to" or "containing but not limited to."

Thus, if you decide that an accused feature includes all the requirements in that claim, the claim is infringed. This is true even if the accused instrumentality includes components in addition to those requirements.

For example, a claim to a table comprising a tabletop, legs, and glue would be infringed by a table that

includes a tabletop, legs, and glue, even if the table also includes wheels on the table's legs.

Patent law gives the owner of a valid patent the right to exclude others from importing, making, using, offering to sale, or selling the patented invention. Any business or -- or any person or business entity that has engaged in any of those acts without the patent owner's permission infringes the patent.

I will now instruct you as to the rules you must follow in deciding whether VirnetX has proven that Apple infringed the asserted claims.

If a person makes, uses, offers to sell, or sells in the United States or imports into the United States something that is covered by the patent without the patent owner's permission, that person is said to legally -- I mean, is to -- that person is said to literally infringe the patent.

To determine literal infringement, you must compare the accused FaceTime system with the asserted claims using my instructions as to the meaning of those patent claims.

A patent claim is literally infringed only if an accused feature, product, system, or method includes each and every element in that patent claim.

If the accused feature, product, system, or method does not contain one or more of the elements recited in the

claim, then that feature, product, system, or method does not literally infringe that claim.

It is well established, however, that "practicing the prior art" is not a defense to infringement.

If you find that the accused feature, product, system, or method includes each element of the claim, then that feature, product, system, or method infringes the claim, even if such feature, product, system, or method contains additional elements that are not recited in the claims.

A person may literally infringe a patent even though in good faith the person believes that what it is doing is not an infringement of -- of any patent and even if it did not know of the patent.

Literal infringement does not require proof that the person copied a patent or a product. You must consider each of the asserted claims individually. You must be certain to compare each accused feature, product, or system with each claim that such feature, product, or system is alleged to infringe.

Each accused feature, product, or system should be compared to the limitations recited in the asserted claims, not to any preferred or commercial embodiment of the claim invention.

You must analyze each asserted claim separately.

If you find that VirnetX has proved by a

preponderance of the evidence that each and every limitation of that claim is present in the accused feature, method, or system, then you must find that such feature, method, or system infringes that claim.

You have heard evidence about the way in which Apple modified the design of FaceTime. You are not to consider this evidence in any way in determining whether FaceTime has infringed any claim of VirnetX's patents. This evidence is relevant, if at all, only to the issue of damages and only if VirnetX has otherwise proved infringement of FaceTime.

I will now instruct you on damages. You must determine the amount of damages to which VirnetX -- VirnetX is entitled for Apple's previously determined infringement via Apple's VPN on Demand.

In addition, if you find that Apple has infringed any of the asserted claims via its FaceTime system, you must also determine the amount of money damages to which VirnetX is entitled for that additional infringement.

The amount of damages must be adequate to compensate VirnetX for the infringement. At the same time, your damages' determination must not include additional sums to punish Apple or to set an example.

You may award compensatory damages only for the loss that VirnetX proves was more likely than not caused by

Apple's infringement.

VirnetX seeks damages in the form of a reasonable royalty. Generally, a reasonable royalty is the reasonable amount that someone wanting to use the patented invention should expect to pay to the patent owner and the patent owner should expect to receive.

Where the parties dispute a matter concerning damages, it is VirnetX's burden to prove the amount of damages by a preponderance of the evidence. VirnetX must prove the amount of damages with reasonable certainty but need not prove the amount of damages with mathematical precision.

However, VirnetX is not entitled to damages that are remote or speculative. In other words, you should award only those damages that VirnetX establishes that it more likely than not suffered.

A reasonable royalty is the amount of money a willing patent owner and a willing prospective licensee would have agreed upon at the time the infringement began for a license to make, use, or sell the invention. It is the royalty that would have resulted from an arm's length negotiation between a willing licensor and a willing licensee.

This is known as the hypothetical negotiation. Unlike in a real-world negotiation, all parties to the

hypothetical negotiation are presumed to believe that the patent is infringed and valid.

In considering this hypothetical negotiation, you should focus on what the expectations of the patent owner and the infringer -- infringer would have been had they entered into an agreement at that time and had they acted reasonably in their negotiations.

In considering damages, you may only award one royalty per device. The reasonable royalty you determine must be a royalty that would have resulted from the hypothetical negotiation and not simply a royalty either party would have preferred.

The parties agree that the date of the hypothetical negotiation between Apple and VirnetX would have been in June of 2009. In making your determination of the amount of a reasonable royalty, it is important that you focus on the time period when Apple first infringed that patent and the facts that existed at that time.

However, evidence of things that happened after the infringement first began may be considered in evaluating the reasonable royalty, only to the extent that the evidence aids in assessing what royalty would have resulted from a hypothetical negotiation.

Your determination does not depend on the actual willingness of the parties to the lawsuit to engage in such

negotiations. Your focus should be on what the parties' expectations would have been had they entered into negotiations for royalties in June of 2009.

In deciding what is a reasonable royalty that would have resulted from the hypothetical negotiation, you may consider the factors that the patent owner and the alleged infringer would have considered or would consider in setting the amount the alleged infringer should pay.

I will list for you a number of factors you may consider. This is not every possible factor, but it will give you an idea of the kinds of things to consider in setting a reasonable royalty.

As listed in this -- as used in this list, the term "patented invention" refers to the patent claims that VPN on Demand infringes and any additional patent claims you have determined are infringed by FaceTime.

They are as follows:

The royalties received by the patentee for licensing of the patents-in-suit proving or tending to prove an established royalty.

Royalties paid for other patents comparable to the patents-in-suit.

The nature and scope of the license as exclusive or non-exclusive or as restricted or non-restricted in terms of territory, or with respect to the parties to whom the

products may be sold.

Whether or not the licensor had an established policy and marketing program to maintain its patent exclusivity by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that exclusivity.

The commercial relationship between the licensor and the licensee such as whether they are competitors in the same territory, in the same line of business, or whether -- or whether they are inventor and promoter.

Whether being able to use the patented invention helps in making sales of other products or services.

The duration of the patent and the term of the license.

The utility and advantages of the patented invention over the old modes or devices, if any, that had been used for achieving similar results.

The nature of the patented invention.

The characteristic commercial embodiment of it as owned and produced by the licensor and the benefits to those who have used the invention.

The extent of the licensee's use of the patented invention and any evidence probative of that use.

The proportion of the profits that is due to the patented invention, as compared to the portion of the profit

due to other factors, such as unpatented elements or unpatented manufacturing processes or features or improvements developed by the licensee.

Expert opinions as to what would be a reasonable royalty.

The amount that a licensor and a licensee would have agreed upon if both sides had been reasonably and voluntarily trying to reach an agreement -- that is, the amount which the accused infringer would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable to the patent owner if it had been willing to create a license.

No one factor is dispositive, and you can and should consider the evidence that has been presented to you in this case on each of these factors.

In determining a reasonable royalty, you may also consider whether or not Apple had a commercially acceptable non-infringing alternative to taking a license from the patent owner that was available at the time of the hypothetical negotiation and whether that would have affected the reasonable royalty the parties would have agreed upon.

The framework which you should use in determining a reasonable royalty is a hypothetical negotiation between normally prudent business people.

In considering the evidence of a reasonable

royalty, you are not required to accept one specific figure or another for the reasonable royalty. You are entitled to determine what you consider to be a reasonable royalty based upon your consideration of all the evidence presented by the parties, whether that evidence is of a specific figure or a range of figures.

When determining a reasonable royalty, you may consider evidence concerning the amounts that other parties have paid for rights to the patents in question or for rights to similar technologies.

A license agreement need not be perfectly comparable to a hypothetical license that would have been negotiated between VirnetX and Apple in order for you to consider it.

However, if you choose to rely upon evidence from any license agreements, you must account for any differences between those licenses and the hypothetically negotiated license between VirnetX and Apple when you make your reasonable royalty determination, including the type of technology licensed, whether the license contained a cross license and/or similar patent protections, whether the license contained any value related to a release of liability, the date when the license was entered, the financial or economic conditions of the parties at the time the parties entered into the license, the extent of use, if

any, of any particularly -- or any particular licensed patents, the number patents involved in the license, whether or not the license covered foreign intellectual property rights, the extent to which litigation may have affected the license, and whether contrary to the hypothetical negotiation the licensee in the real-world license at the time of entering the license believed that the patents were either not infringed or were invalid.

VirnetX has relied on license agreements in which royalties were based on a percentage of the entire price of the licensed end products. But in determining a reasonable royalty, you must not rely on the overall price of Apple's accused products at issue in this case.

Damages for patent infringement must be apportioned to reflect the value the invention contributes to the accused products or features and must not include value from the accused products or features that is not attributable to the patent.

You must perform your duty as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion.

All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict regardless of the consequences.

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life.

All persons, including corporations, and other organizations stand equal before the law, regardless of size or who owns them, and they are to be treated as equals.

After the closing arguments, when you retire to the jury room to deliberate on your verdict, you will take a copy of this charge -- or copies of this charge with you, as well as the exhibits which the Court has admitted into evidence.

You will select your foreperson and begin your deliberations.

If you recess during your deliberations, please follow all of the instructions that I have previously given to you about your conduct during the trial.

After you have reached your verdict, your foreperson will fill in on the form your answers to the questions. You should not reveal your answers until such time as you are discharged unless you are otherwise directed by me.

Any notes that you may have taken during the trial, of course, as we discussed at the beginning, are only aids to your memory. If your memory should differ from your notes, then you should rely on your memory and not your notes. Your

notes are not evidence.

A juror who has not taken notes should rely on his or her independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

If you want to communicate with me at any time during your deliberations, please give a written message or a question to Ms. Mayes, our Court Security Officer, and we will provide you with sheets of paper on which to do that, and Ms. Mayes will bring that directly to me.

I will then respond as promptly as I possibly can, either in writing or by having you brought into the courtroom so that I can address you orally.

I will always first disclose to the attorneys what your question was and my response before I answer your question.

And then, finally, after you have reached a verdict, you're not required to talk with anyone about the case unless I order otherwise.

And I promise you, I was going to read through the verdict form, which I will do. You will, of course, have a copy of the -- of the Court's instructions with you. Each of you will have a copy of that. And then one verdict form will go back with you.

The verdict form reads as follows:

In answering these questions, you are to follow all of the instructions provided by the Court in the Court's jury instructions.

Your answers to each question must be unanimous.

As used herein, '504 patent means U.S. Patent No. 7,418,504, and '211 patent means U.S. Patent No. 7,921,211. And there are two questions on the verdict form, both of which must be answered.

The first question, Question No. 1: Did VirnetX prove by a preponderance of the evidence that Apple's FaceTime infringed any of the following claims of VirnetX's '504 and '211 patents?

Answer yes or no for each claim.

And then on the left side, there's '504 patent and a column underneath that, which has a blank for Claim 1, Claim 2, Claim 5, and Claim 27 -- four blanks, yes or no in each of those blanks.

And then on the right side, the '211 patent. There's a column there, and there are blanks for Claim 36, Claim 47, and Claim 51. Yes or no in each of those blanks.

And then you continue on to the second page.

Question 2 is: What sum of money did VirnetX prove by a preponderance of the evidence would fairly and reasonably compensate VirnetX for Apple's infringement by VPN

on Demand and infringement, if any, by FaceTime? And then there is a blank for you to fill in the amount.

And the bottom reads as follows: We, the jury, unanimously answered the preceding questions by a preponderance of the evidence as instructed for each question.

And there's blanks to date and sign the verdict form by the jury foreperson.

And that -- that's how the verdict form reads. It's now time for the parties to present their closing arguments.

And Plaintiff VirnetX will begin.

Are you going to split your time, Mr. Ward?

MR. WARD: Yes. Your Honor.

THE COURT: Okay.

MR. WARD: We're going to do 25 for me. And if I could have a five-minute warning before I get to that 25-minute mark?

THE COURT: I'll do that.

MR. WARD: Thank you.

May it please the Court. Counsel.

Ladies and Gentlemen of the Jury, good afternoon.

I know there's lots of places you'd rather be on this Friday afternoon. Looks like we're going to have a lovely evening, but you've got to bear with us just a little

bit longer.

I get to be the first one to thank you, and I want to thank you for your service. I know this has been an imposition on you, but you have figured out by now that this is a dispute that would not be resolved unless we had eight able-bodied folks willing to come and serve like you all have. And for that, we all thank you.

These issues seem pretty complex, and they are. The technology is complex. You've got two parties before you taking polar opposites on both infringement and damages -- for infringement on FaceTime and then damages. And I want to try and give you some help on (a) how can you answer these questions, and (b) what is the evidence that supports those answers.

We started this case when Mr. Caldwell spoke to you in the opening by telling you that actions speak louder than words. And we mean that. We've heard that our whole lives. And I want to highlight some things that I think illustrate this point.

First, the fact that Apple did not bother to show up for this trial. Now, they sent lawyers. They sent some experts. But as I discussed with Mr. Bakewell, even as children, we learn that we go take responsibility. They didn't even bother to show up when facing a damage claim of over $300 million.

And why is that? That's because they know they infringe, and they owe VirnetX money. Owing VirnetX money is undisputed in this case.

Now, who did show up?

Dr. Short showed up. He sat here through this entire trial.

Kendall Larsen showed up. He -- he answered questions. And even though they told you that fact witnesses really weren't important, they weren't going to waste your time, they spent three hours cross-examining our fact witnesses. So apparently they thought our fact witnesses were somehow important.

Dr. Short and Mr. Larsen told you about the history of VirnetX, the history of these inventions. They answered questions.

Now, I heard a couple of interesting excuses during the trial as to why Apple didn't show up. One of them was, oh, well, you all showed some licenses and they were marked confidential and our -- our employees couldn't have been present to see those.

We didn't seal the courtroom when we were showing those licenses. Lots of folks have seen those licenses. That -- that's just an excuse that rings hollow.

The other excuse I heard was, well, there's not really a dispute on how this system works, so we didn't bring

any technical folks down here to describe it to you, even though their own technical expert admitted that the Apple employees know this system better than anybody else.

The folks that know the system best didn't show up to answer questions. And why is that? Think about it.

So two questions. Does FaceTime infringe? And if so, how much money do they owe for the infringement of FaceTime and VPN on Demand?

Apple infringes. We know they infringe the VPN on Demand with their "Always" mode. That's not disputed.

And sometimes I worry that we didn't spend enough time talking about VPN on Demand because you can tell we've got limited time, and I know y'all are -- are happy about that.

We'd probably keep you here for two weeks if we could because after six years, we want to make sure we present all the evidence we can, so we had to focus on the issues that are in dispute, but this is a big deal that it's already been determined that VPN on Demand infringes.

Because Apple is a company that you now know will fight to the bitter end. They will not admit anything. They don't admit infringement of FaceTime, even though they admit they owe us at least $23 million for the infringement with this feature. A company that won't admit anything can't stand before you and deny infringement.

And think about this when you're thinking about what kind of parties you're dealing with: A company that has infringed Dr. Short's invention for six years. Did you ever hear anyone from Apple -- well, one of their lawyers, turn and say, Dr. Short, we're sorry that we used your property without permission and that we owe you $23 million? We're sorry about that. Not even an "I'm sorry." Maybe they'll say it today for the first time. We'll see.

Now, FaceTime infringes. This is the -- the issue that I really didn't know how much time I'd have to spend in closing because I knew what Dr. Blaze had said under oath. He said something different today, and we're going to talk about that.

As His Honor just instructed you, we have the burden of proof. We've got to prove our case by a preponderance of the evidence. And that simply means the greater weight of the credible -- credible evidence. Is something more likely true than not true? If the scales tip slightly in our favor, then VirnetX prevails.

I think we've tipped them greatly in our favor, and I'm going to show you that, but that's our burden on both -- both infringement and damages.

Now, I want to talk about this instruction. To determine literal infringement, you must compare the accused FaceTime system with the asserted claims. Compare FaceTime

to the asserted claims.

Dr. Jones walked you through how the Apple FaceTime system worked. This is one of the animations that he showed you during his direct, and you can see there's a lot of things going on in this animation, because the patents in dispute, they cover this entire system.

We've ended up focusing on this secure communication link, but that doesn't just -- that's not the invention by itself. There's a lot of other things going on.

And I want to highlight this demonstrative from Dr. Jones's testimony.

As you recall, he took you through a step-by-step explanation and laid out exactly how Apple's FaceTime system worked. He went through each of these elements and -- and showed you these things.

And it's important that he showed you all these things, and it's important because even though Apple now acts like, well, this is just a dispute about anonymity.

If you'll recall, Mr. Arovas was cross-examining Dr. Jones, and he was -- got down and was talking about this communication link. And if you'll recall, Dr. Jones said, is that all y'all are disputing? Mr. Arovas did not answer that question. Because Apple said we admit nothing. Prove everything.

So we spent our time going through, proving it.

I'm glad we did because of this, because this system functions altogether and that entire system functions and Apple -- and Apple's FaceTime system infringes the entire claim.

And you get down to this -- this last element, and you see that we start talking about a network address and to compare an indication that the domain name service system supports establishing a secure communication link. That's the language from Claim 1, the last element because that information that's being provided is specific information on the type of NATs and the sender's IP address. Apple specifically configured their systems to use these NATs.

Did we invent NATs? Of course not. Did we invent the Internet? Of course not. Did we invent servers? Of course not. What we invented was a simple and secure way for establishing these secure communication links. And Apple moved right in on top of it, just like they did for VPN on Demand.

Now, after six years and $10 million in litigation fees, we can figure out at the -- once Apple starts presenting their case, that they're only going to challenge one thing. They're going to challenge anonymity. We suspected that's what it would be, but they put us to our proof, and that's okay. That's what we're down to, anonymity.

Outside of this courtroom, in Plaintiffs' Exhibit 1068 -- this is Apple's iOS security document from October of 2012. Now, no one came to explain this away. But what are they telling the world about the security of their FaceTime system? Talking about security.

Additionally, communication using FaceTime and the Apple push notification server is fully encrypted and authenticated. Yet Dr. Blaze took the stand during questions today and said: We don't really care about anonymity at Apple. It's not really that important to us. I'm sorry, to Apple. He's not us, is he? Not really important to Apple. Their own documents say something else.

And what did he say on the stand?

So you'll agree that NATs hide a person's private IP address -- IP address?

He said: That's right. The private IP address is never sent.

This question is important.

Apple specifically went out of its way to support FaceTime calls originating behind a NAT and terminating behind a NAT, correct?

And Dr. Blaze's testimony: That's right. There are features in FaceTime intended to support that.

It's exactly how they designed their system. The fact that they use NATs that were around before, really

doesn't matter. It's the way that they configure their system to use those NATs.

Now, he said some different things on direct, and Mr. Caldwell confronted Dr. Blaze with his prior sworn testimony. And I think this is the clearest example I can show you of what his sworn testimony was before he got to the courtroom, and he agreed with it today after saying something different.

This is the question put to Dr. Blaze: And you'd agree, generally, wouldn't you, that sometimes you may be able to tell that there's communications in a VPN or a secure communication link, but not be able to correlate it to a specific machine or person based on that information, right?

Answer: That's right.

Next question: And that is within the scope of anonymity contemplated by these patents, isn't it?

Yes. I -- that's an assumption that I'm starting with.

And that was an assumption we thought he was starting with until today. So that'd be a question to Apple.

In their 45 minutes when they get up here to answer questions, let's see if they can explain away Dr. Blaze's sworn testimony about anonymity behind these NATs being the scope of anonymity in these patents.

What about TARP? We heard about TARP. They're

comparing -- they were looking at TARP in the patent. But look at this question and answer:

There's some points I'd like it make, but let's just kind of cut to the -- cut to the chase. Anonymity in this case does not require the use of TARP, does it?

And his answer: Oh, no.

Well, he knows that, and Apple knows that.

And His Honor just instructed you on this, and this is proved to you about who's wasting time in this courtroom.

On Page 9 of the instructions: Each accused feature, product, or system, should be compared to the limitations recited in the asserted claims, not to any preferred or commercial embodiment of the claimed invention.

Who was wasting your time talking about TARP? How much protection do we need afforded?

Look at this answer: Claims don't require any particular anonymity.

Question: And for purp -- and for purposes that we're addressing in Court, you agree anonymity does not have to apply against all possible attackers? It just has to apply against some reasonable threat model?

That's right.

So I don't know why we were talking about CIA covert operations. It's just reasonable threats.

And you recall this -- this comparison between the

claim terms. We know Apple infringes with their virtual private network because those communications are secure and anonymous.

And then you've got those same terms appearing in the secure communication link. Mr. Caldwell walked Dr. Blaze through his own example. When you change these two things, he says: This is anonymous. But this is not. Does that make any sense? It doesn't.

Damages.

We brought you Dr. Weinstein. And I elevated him. Mr. Weinstein.

We brought you Mr. Weinstein, and he talked to you about these license agreements, and he told you that he averaged these license agreements together and that the average of the per-unit royalty, that's royalties that folks are paying on each device was between $1.20 and $1.67. Some were higher, some were lower. We're going to talk about the ones that were lower, specifically Microsoft.

But there's one thing I want to talk to you about, and I -- I don't ask you to write down many things, but this might be helpful if you write this down because this is not in dispute, all right, and this is the number of infringing units.

VPN on Demand, which Apple admits they owe money for. There's 234,002,943 units that they admit infringe.

Now, if you find that FaceTime infringes, as well, the total number of units for VPN -- VPN on Demand and FaceTime goes up by about 18 million, and the total number, if both infringe, is 252,023,292.

You'll multiply that number, whichever one you find is appropriate, times a rate. And so really the rate is the only thing that is in dispute for damages. And to some extent -- there's a difference of 18 million units whether FaceTime infringes or doesn't infringe. But the math is just going to be the number of units that infringe times a rate.

And let's talk about the rate because this is from Mr. Weinstein. And he walked you through, and actually, Mr. Bakewell agreed with all these calculations.

Remember, it was only a dispute about whether we did the weighted average or a true average. Mr. Weinstein does a true average. And think about this, with one exception, the exception of Microsoft, all of these companies, Mitel, NEC, Siemens, Aastra, and Avaya, they are paying the rates that you see out here to the right. They're paying them in the past, they're paying them currently, and they're going to pay them out until 2022.

Now, is one of these companies the -- the next Apple? I don't know. They could be. And if they are, guess what, they're going to be paying VirnetX these rates as they grow.

Might they fail? They might. And if they fail, they won't pay VirnetX anymore. But these are the rates they're going to pay until the end of these patents in the U.S. and only in the United States.

But what does Apple what? They're Apple. They want the Microsoft deal, right. And they -- they showed you, and Mr. Weinstein and Mr. Bakewell actually agreed on the -- the rate would be 19 cents in the United States. For U.S. sales the rate would be 19 cents. And they said, look at Avaya, it's -- it's 34 cents. But to assign that rate, you have to completely ignore the other licenses.

All these other companies that have said, you know what, we'll take a license and we'll pay for what we use, and we'll pay for what we use until 2020, Apple says, don't look at them. Don't look at those license rates. We want the deal that Microsoft got, and we're going to bring you Mr. Bakewell to tell you why that is the way things should be.

And I want you to consider the credibility of Mr. Bakewell, because there are a couple of things that happened during his examination. And I'm a little hard of hearing, I'll admit to you, and there was an instance yesterday when I was cross-examining him and I was talking to him about this Microsoft amended license, and I was talking to him about the U.S. population. And if you'll recall, he was telling me how many registered users there would be in

the year 20 -- 2014, 193 million.

And I said: Do you know what the population is going to be in 2020?

He knew what his calculation was and he said: 500 million.

I said: Okay. 500 million. Do you know when the U.S. Census Bureau is?

Yeah.

I show him the population is going to be 330 million, which is less than the folks he said would be registered in the year 2020.

And I said: Did you say 500 million?

And he goes: No.

I don't know if you remember that, but I did. I had to go back and read the transcript because I thought I had mis -- misheard him. That man would flip that quick from saying he said something, to he didn't say something.

Because he knew it sounded ridiculous.

Now, they want the Microsoft license. You heard Mr. Larsen tell you under oath that it was a one-time special deal. It was a first license. It was limited in scope. And that Microsoft continued to deny that it infringed. You saw that in the license agreement.

It's not the situation we have here. Apple has to admit that it infringes for this hypothetical negotiation, it

has to assume that. Microsoft denied it. And so to believe that this was not a one-time special deal, you've got to disbelieve Mr. Larsen.

But the Court has instructed you that when looking at license agreements, it's appropriate for you when considering former license agreements or license agreements that go into this calculation, you may consider the financial or economic conditions of the parties.

Now, they asked Mr. Larsen a lot of questions, didn't they, on cross? We brought him. He took their questions. They talked to him about this 8-K. He got a bonus. He got a raise --

THE COURT: Mr. Ward.

MR. WARD: -- in February of 2010.

THE COURT: Mr. Ward, you have five minutes remaining.

MR. WARD: Thank you, Your Honor.

Remember those questions?

What did they not show him? The 10-K from a month later. What were they telling the world while they were having to negotiate with Microsoft? We're devoting a substantial amount of our financial and management resources to the Microsoft litigation; and if we are unsuccessful in this lawsuit, our financial condition may be adversely affected, and we may not survive.

Now, is that consistent or inconsistent with what Mr. Larsen told you under oath? And did Apple bother to put that document in front of him and ask him questions about it? A document that was after the 8-K, a document that was cited in Mr. Bakewell's report, a document that they knew about.

They didn't bother to ask him about it, though, did they?

And for that reason, if you want to disregard the Microsoft license agreement, you're perfectly permitted to do that, because it was negotiated under different circumstances. And if you did that, the rate would go up to $1.41 versus the $1.20.

So I'm not telling you what to do, but that's why there's a range that goes from $1.20 to $1.67.

Apple tells you that its sales are closest to Microsoft, and they show you this chart. I just want to remind you that these are not dollars, these are units. And the 2 billion is a projection for worldwide sales until the year 2020.

All right. So that's past and future. So if they show you this chart, remember, they're showing you they've sold 234 million phones during this four-year period, and they're comparing it to worldwide sales from Microsoft out to 2 billion.

I'm going to quickly show you a couple of surveys.

They're in evidence. Just about the importance of these features.

Ease of use. This is for the iPod, 93 percent of folks in the United States said ease of use was important to them.

Here's another one talking about ease of use, 92 percent of folks said that that was right at the top, ease of use of the 4S.

And why am I showing you these surveys? Because these patented features, one of the things that you heard from both Dr. Short and Mr. Munger, the thing that was invented was the fact that they made these devices easy to use.

Now, you saw this document and you saw it pretty briefly.

It's Plaintiffs' Exhibit 1127. And I want to explain to you what it is real quick.

This is an email from Jeremy Butcher who works at Apple. You see the date on it, April 11, 2013.

And if you look in the -- the attachment it says: iOS for IT infrastructure survey web architecture.

And I'm showing this to you because it's going to be a survey, they're surveying IT professionals during the pendency of this lawsuit, they're going to internally do a survey, Apple internally is going to survey IT professionals,

who are the folks that know about VPN on Demand.

And what do they do in their survey?

They got a question. While this lawsuit is pending, they're going to ask IT professionals: Do you use VPN on Demand? What does Mr. Butcher or somebody at his direction write in there: Remove this. They don't want to answer that question. It will show up in this lawsuit, won't it? Let's just not develop the evidence. Let's not bring the people. Standard thing for Apple.

We know that VPNs are important features. They told the world they were going to remove them. And guess what, their -- their customers revolted, and within a two-week period -- look, April 14th, 2013, they say they're -- they're going to remove this feature. People complain, and 10 days later, they say: We take it back. How much complaining do you think there had to be to get Apple to take it back within 10 days?

One last area, and this is the amount of money that Apple spent trying to avoid infringement. They got this contract with Akamai. And they said, oh, well, look, it was for 21 months, $50 million, and they did some lawyer math to show, well, that's just $4 million a month.

Well, then Mr. Bakewell said: Oh, it was in the ballpark of 50 million for five months. He didn't want to agree with that totally on the stand, but I showed him his

testimony, and they didn't explain that away.

And then Mr. Casanova testified by deposition. He said: It was tens of millions, it might even be a hundred million dollars. So you've got 50 million to a hundred million dollars on something that Mr. Blaze told you was -- Dr. Blaze told you was technically inferior.

How do we know it was inferior? Because they came back. And just because those units aren't accused in this case, don't worry about that. They're being dealt with in another matter at a future time. It doesn't mean they don't infringe. They came back, but we're counting the units between 2009 and 2013 in this case. Technically inferior.

I've got to leave Mr. Caldwell some time, so I'm going to end here and suggest to you that this -- these are the answers to the questions on your form: Yes for all claims, both patents. And there's the amount of money they owe if you find it's $1.20 times the admit -- times the admitted number of units -- I'm sorry, VPN admitted plus the 18 million FaceTime. That's the amount you get, $302 million.

Thank you for your time.

MR. AROVAS: Your Honor, may I have a moment just to --

THE COURT: Certainly.

MR. AROVAS: -- set up?

THE COURT: Certainly.

MR. AROVAS: Thank you.

Your Honor, may I proceed?

THE COURT: You may.

MR. AROVAS: Thank you very much.

And good afternoon, Ladies and Gentlemen. I want to join Mr. Ward, everybody from VirnetX, and everybody from Apple in thanking you for your time and attention to this matter. I know -- we all know it's a lot of work, and we truly appreciate what you've done and your time here this week.

Now, sitting through this trial for a week, you may wonder why cases like this are presented to juries. And there's a long history in our case -- in our country presenting patent cases to juries, and there's a good reason, because juries have an ability to bring common sense to complex disputes.

And the Judge is going to tell you, you're the judge of the evidence. You decide how to weigh the evidence, and you decide what evidence to credit and what evidence is just a sideshow or a distraction.

And on that point I actually want to pause for a moment. I was a little taken aback by some of the comments made by Mr. Ward -- I actually am pretty surprised by them. And he made this comment -- actually Mr. Caldwell made it in

his opening statement, too, about actions speak louder than words.

And why would Mr. Ward start with some of the things he's started about? Surprise on the anonymity, that Dr. Blaze was going to say there's no infringement because of anonymity. He knows full well we have believed since the very beginning, FaceTime was not designed to be anonymous. It was never designed to be anonymous. He had that in written reports given to him by the orders of the Court on the schedule that they were supposed to be given to him. He knew that.

And let me tell you something, if he thought he was being surprised, he would have dealt with it and gone to the Court and said, hey, there's something unfair going on here. He knew since the very beginning.

The license agreements. You heard that comment -- oh, that's an excuse. The Apple people can't see the license agreement. That's just an excuse. I showed that to you in open court. You know what that is? Trial theatrics. You saw that stamp on the bottom. That was put on by VirnetX.

It wasn't anybody from VirnetX here who said, oh, yeah we give Apple consent to take those documents and show them to Apple's in-house employees. Mr. Ward knows that.

Mr. Ward knows how a protective order works; that the Court enters a protective order that says we are ordered

by the Court not to share those documents. They are given confidentially, attorney's eyes only, and we're not allowed to share them.

And so the fact that Mr. Ward decides to do it for the first time here in Court, what is that? That's not about the merits of this case. That's not about getting to the right answer. That's just trial theatrics.

Dr. Blaze's testimony has been consistent since the beginning. What Dr. Blaze explained, he explained it here, he explained it in his reports that he gave him, he gave a deposition, is that what FaceTime is doing. And when I talk about the details a little later, it's no different than ordinary Internet communications. It's no more anonymous than the regular Internet; and that, frankly, the claim that FaceTime is anonymous, doesn't make any technical sense.

So why are we here? Well, VirnetX is trying to ask Apple to pay 10 times more than its nearest competitor. It's trying to take patents that Apple passionately believes do not apply to FaceTime, and apply them in this case. And that is why we are here.

And as I said at the beginning, there's actually only two specific issues that we have to resolve in this case: Does FaceTime infringe two patents? And what is a reasonable royalty?

FaceTime, Ladies and Gentlemen, was designed to

work in a different way. It is not something that was designed for confidential business communications. It wasn't designed to allow people to hide on the Internet. It wasn't designed for those types of purposes. There are other features -- VPN on Demand. VPNs, for example, are designed to do those specific types of things, not FaceTime. FaceTime is a different type of feature.

Now, what does VirnetX say sort of in response to Apple's evidence that FaceTime is not anonymous? Well, what VirnetX says and what they've been telling you in this case doesn't make any sense. They're telling you, don't worry about those public IP addresses, they don't make any sense.

But, Ladies and Gentlemen, if a system that shared the public IP addresses was actually anonymous, why is everybody trying to hide them when they want anonymity? Why does every example in the patent hide IP addresses for anonymity?

Why does Tor exist? Dr. Blaze talked about it. An anonymity -- anonymity service. It hides IP addresses.

Why do the VPNs hide and encrypt the IP addresses? Everybody in the technical world who studies security and anonymity wouldn't be out there encrypting and hiding IP addresses when they wanted to design an anonymous system if it didn't matter, and the IP addresses matter a lot.

Now, I had mentioned that there are three key facts

in this case to look at that resolve the two issues. I'm going to talk about the first two, and I am going to share the floor with Mr. Jones who is going to talk about the last one.

So let's jump into the first one which is the VirnetX patents require anonymity and FaceTime is not anonymous, the second one.

The first one is very easy. We've all seen a lot of this over the course of the case. The patent ends with word descriptions of what it covers and what it doesn't cover. The Court has given us a construction, a definition that we must apply. And what does that say, it says that there must be data security and anonymity, not just one.

In fact, interestingly, if you look at the document that Mr. Ward showed you about FaceTime, what did it say? Encryption. That's what it said. It didn't say anonymity because FaceTime is not anonymous. Encryption, that is data security, and that is not the same thing as anonymity. It's different.

So, obviously, as Mr. Jones -- as -- I'm sorry, Mr. Ward pointed out, there's a dispute between the parties. Apple believes it does not infringe the FaceTime patents, the patents asserted against FaceTime. And VirnetX says the opposite. That's the -- the '211 and the '504 patents.

And so how do you go about resolving this issue?

I'd like to encourage you to think about a couple things.

First of all, in the jury room, ask yourself what evidence have you actually seen that FaceTime is anonymous? Use your common sense, okay? We have produced hundreds of thousand of pages of documents in this case. The products have been around for six years. Did any documents call FaceTime anonymous? Did you see anything? Did any customers call it anonymous? Any articles call it anonymous? Any engineers call it anonymous? Any blogs on the Internet?

I mean, Ladies and Gentlemen, if FaceTime was anonymous, you would have seen a document or some piece of evidence that said it for products that are sold as widely as these products, that are studied as widely as these products. And the fact is, you haven't seen it because it doesn't exist because these products are not anonymous.

And I asked Dr. Jones about that, and we all agree, if the jury concludes, if you conclude that anonymity is missing, FaceTime does not infringe.

And so let's talk a little bit about what -- what Dr. Jones said about anonymity and this issue of IP address, the private and the public.

And so when Dr. Jones was testifying about direct, he was asked: What is your theory of anonymity? Explain to us why NATs provided anonymity.

And he said: Well, there's the private addresses.

You see at the bottom, yellow, replace the public addresses in the headers of the packets.

And then what does he say happens?

He says: Well -- he's asked: Are the private address even sent across the Internet?

And he says: Not in a secure communication link, no, they're not.

So his basic point is, there are private addresses in your home that go from the computer to that box that connects to the wall, the public addresses that go over the Internet. He says the private addresses aren't sent, right, so, therefore, there's no -- there's anonymity. There's infringement.

Now, I asked Dr. Jones about that. And I said, wait a second, that's not really correct, is it?

And I asked him, I said: Well, after this link is set up, there's some information sent, the SIP packet that Dr. Blaze talked about, as well, and that private IP address is actually sent over the Internet.

And if you look at the first quote at the bottom, he said -- I asked him: So the private IP address is actually visible on the Internet, right?

And he says yes.

And it's on that peer-to-peer connection, the connection that we're talking about in this case.

So what do we know -- and so I followed up, and I said: Well, wait a second, because his theory is the private IP addresses are hidden, only the public are sent.

And I asked him: But wait a second, the way FaceTime is set up, the way FaceTime works, isn't it true that the private IP addresses and the public IP addresses will be visible on the Internet?

And he says: Yes.

And then we drew a picture. Let me put this over here.

And you may recall that I went through this picture on the document camera with Dr. Jones. I said: Okay, if this is your theory, the private IP addresses are hidden and not sent out, let's explore that.

And I said: Well, we know the public IP addresses over this link, they're clearly sent over the Internet. We know that. And so anybody who wants to see them can see them.

But also, when the call is set up, when this link is set up, the private IP addresses over here are also sent.

So I confirmed with him in cross-examination private IP addresses, public IP addresses, both visible on the Internet.

So even if you believe that theory that Dr. Jones was using, even if you believe that both the private and the

public IP addresses are being sent over the Internet, and there would be no anonymity.

Now, why does this matter? Well, because IP addresses give a lot of information that is critical when you're talking about the function of the Internet. Dr. Blaze explained it.

I won't go through the details, but it's basically, you can think about it like a letter. It's like putting the address on the cover of the letter. That's what takes the information to your front door.

In the Internet, it's obviously not a physical letter, it's a package or a packet, it's a package of digital information, but it still has that address on the front that takes the information to your front door. And we know that this information is one of the most important pieces of information when you're talking about how the Internet works.

How do we know? We know it is used for all of the communications to get information across the Internet toward the front door of somebody's house.

And so if you ever wondered, you get on the Internet and you're on your computer, and you wonder how does the computer or how does the Internet know so much about what you do, right? Those ads pop up.

So if you're shopping for a car one day, a week later you see ads starting to come up about cars. You're

shopping for fishing gear, you get fishing ads showing up, those sorts of things.

Well, the reason and the way that works is the IP address. Every place you go, you drop -- you leave your IP address. That creates a digital record of everywhere you've gone. That's what IP addresses do. And that's why when you share your IP address, once you do that, there's no anonymity.

Now, what does Dr. Jones say about this? Well, he wants to pretend the IP addresses don't really matter that much. And I don't know if you remember, but he had this slide that he used, which showed the hacker on the top, you may recall, and you had the Internet on the bottom.

He said: Well, look, really, the issue of anonymity is just eavesdroppers.

Now, when I talked to him about -- and I asked him some questions on cross-examination, he said: Well, actually there's a lot more going on that's relevant.

So, for example, we know that it's not just really about hackers. It's about websites. Websites will track your IP address, will store your IP address, and use it.

We know, and I asked Dr. Jones about it, it's actually well-known that IP addresses are also used by advertisers, right, so advertisers are using IP addresses, as well.

We asked him about the police. The police use IP addresses to track specific computers to specific people, as well. So the police are using IP addresses.

Your Internet service provider, same thing, uses IP addresses. They actually -- I asked Dr. Jones about that, they will store them, sell them on digital mailing lists, and use them for various commercial purposes.

IP addresses, Ladies and Gentlemen, are one of the most critical pieces of information on the Internet when you're using Internet communications.

Now, there was a juror question about this very issue, and the question was to Dr. Jones: I've noticed that I receive targeted advertisements. Do I need to worry about that or do I need to beef up my security?

And the answer Dr. Jones gave, he explained a couple different things you could do, but part of the answer he gave actually kind of floored me because in this case, we're talking about IP addresses, and what did he say? It's highlighted on the screen. He said: Another thing you can do on browsers is there's a check box that you can check for "do not track."

Well, what is "do not track"? Okay. If you go to your computer, you click your computer, there's a place to check something, and it says: Do not track. What "do not track" does is telling the websites, don't track my IP

address. This is specifically about tracking of IP addresses. That feature wouldn't be in browsers if sharing your IP address wasn't significant for the issue of anonymity.

It's very simple, Ladies and Gentlemen. If you want to be anonymous on the Internet, you shouldn't be giving out your IP address. That's why services exist like Tor, like VPNs, to give you ways of concealing that.

Now, FaceTime works in a very different way. FaceTime uses ordinary IP addresses in an ordinary way. It uses the normal addresses for the Internet just like you do when you surf websites, when you do web shopping, or any of the other normal activities.

The whole purpose of FaceTime is use ordinary Internet connections in an ordinary way.

Now, if we go back to Dr. Jones, what does Dr. Jones say about this? Well, Dr. Jones, when he describes his theory of anonymity, he says: Well, wait a second. So anonymity is effectively the Internet plus these two NATs that we've heard a lot about, the NATs. He said, well, these NATs create the anonymity because you don't see people behind these NATs.

Well, we know from the testimony I showed you earlier, in fact, the private IP address is shared and the public IP address is shared. But the other thing we know is

this structure, these NATs for the Internet, that's the basic function of the Internet. To say that this is anonymous is effectively to say the Internet itself is anonymous, which we know, of course, is not true.

If the Internet were anonymous already before the VirnetX patents, you wouldn't need the VirnetX patents to decide the problem of anonymity and security.

And we actually covered this issue with Dr. Short, and -- this was a heavy board. I got it. We actually covered this issue with Dr. Short. And Mr. Appleby asked Dr. Short some questions about what was the architecture of his patent and what was the architecture of the basic Internet.

And I'm sure if you recall that, that was Day 2.

And what Dr. Short said is he said: Well, this basic approach of having the Internet with two NATs and two houses, that is the basic architecture of the Internet. And if you were to compare that to FaceTime, what would you see?

Well, you would see that FaceTime is set up exactly the same way as the ordinary Internet to do normal web communications.

So on the left, you have basic Internet. This is what Dr. Short said was the basic architecture of the Internet. You have two NATs. You have the Internet and two houses, that basic approach. That approach is identical to the approach that's taken by FaceTime. Houses with NATs

communicating through the Internet using encryption. That's what Dr. Short showed us was the background.

That was the basic structure of the Internet that existed before the patent, and that was not -- that was not his invention, right? And that's what FaceTime uses.

And now Dr. Jones, we heard a little bit from Mr. Ward talking about this. He said: Well, there's all that other stuff going on, that NAT -- that comNAT server. That has nothing to do with the issues that we need to look at.

The only issue we need to look at is this link here. Is this link anonymous? And that's what the Court told us. The Court told us, you have to look at the secure communication link.

I asked Dr. Jones -- he said you have to look at the secure communication link. And that's what Dr. Blaze said, you look at the secure communication link. So, of course, FaceTime is designed to work with NATs.

Why is FaceTime designed to work with NATs? Well, because the NATs were around when FaceTime was designed. If FaceTime wanted to work over the Internet, it had to work with NATs.

So, of course, Apple designed the product that's supposed to work over the Internet to work with the Internet as it's designed, and that includes NATs.

But the key point here is the basic Internet is not

anonymous. The approach of FaceTime, of using NATs is no more anonymous than the Internet was before VirnetX's patents or the Internet is today. The Internet is basically not anonymous. That's why all these techniques to create anonymity exists.

Now, just because FaceTime is not anonymous doesn't mean it doesn't protect the people who use it when they use the Internet. But it takes a different approach.

The FaceTime approach is to use encryption. And so how does FaceTime do this? And you've heard a lot of testimony about this over the course of this trial. FaceTime encrypts the audio and the vid -- and the -- the video information that's sent between the two com -- computers that are talking to each other so that information -- your picture, the -- your voice, what you're saying, the video of what you're doing is safe and secure. That's encryption. And that is how FaceTime protects the content.

What FaceTime does not do is add -- and as Dr. Blaze explained, add any anonymity on top of that. There was no anonymity technique used whatsoever in FaceTime. And you can see in the document used by Mr. Ward, in the FaceTime section on the FaceTime security, what does that say? It's protected by end-to-end encryption. Uses encryption.

You can go through that entire document. You won't find anything about anonymity because that's not how FaceTime

is designed.

You heard from Dr. Blaze earlier today. He is one of the foremost experts in anonymity and security. He's devoted his life to studying anonymity and security.

And what did he tell us today? If you look at the bottom answer: FaceTime uses conventional Internet communications. There is no anonymity. It's just communicating the way people normally communicate over the Internet. If you want anonymity, you can get it, but you have to do something additional.

What else did he tell us? He tells us there are many different ways of achieving anonymity. I'm not saying there's only one way of doing it, but there are certain common features of how it's done, and they all relate to concealing or hiding in some way the true IP addresses. And we see that in the patent. Every example, every embodiment in the patent hides IP addresses.

TARP, we heard about, hides IP addresses. The different other ways of achieving anonymity -- mixes, crowds, Onion Routing, all different ways of achieving anonymity. They all hide IP addresses.

As Dr. Blaze explained, every one of the known anonymity techniques that people use in this field, hide the public subscriber IP addresses, the IP addresses that are actually used on the Internet. That's what Dr. Blaze

explained to you. That's what's in every example of the patent.

And if you think about the evidence that VirnetX actually brings to this case, what did they actually show you that says that FaceTime is anonymous? All right. We know it uses basic Internet communications. That's not anonymous. We've seen documents. We've seen -- we've seen web blogs. We've seen articles. None of the technical manuals, none of them identify FaceTime as one of the techniques or features you can use if you want anonymity.

And so where does the evidence take us? Well, as you know, the Court's definition requires data security and anonymity. FaceTime is missing anonymity. If FaceTime does not -- if you remember that soccer ball and football example I used at the beginning of this case in opening statements? You must have all the elements, all the requirements.

FaceTime is missing anonymity, and so there is no infringement.

So when you go into the jury room and you fill out the verdict form, this is Question 1 on the screen, think about the evidence. FaceTime is not anonymous. And for that reason, the answer to all of the questions, all of the claims in Question 1 is no, for the same reason. All of those claims require anonymity. FaceTime is not anonymous and does not infringe.

So, Ladies and Gentlemen, that brings me to the end of my comments, and I'm going to turn the floor over to Mr. Jones.

But think about the evidence as you head back to the jury room. Think about the fact that the IP address over the Internet is one of the key pieces of information used by advertisers, Internet service providers, police authorities, and websites, and anybody who is looking at Internet traffic.

As Dr. Blaze explained, the IP address is the key to -- to -- to anonymity on the Internet; and once that IP address is shared, there is no anonymity.

FaceTime simply does not work that way. And as Dr. Jones admitted, both the public and the private addresses are shared over the Internet. The public addresses are that gateway or the path to the front door of your house on the Internet. There is no anonymity with FaceTime, and it cannot infringe the VirnetX patents.

So thank you very much, Ladies and Gentlemen.

And with that, let me turn the floor over to Mr. Jones.

MR. JONES: Your Honor, could I have a warning at seven minutes?

THE COURT: Certainly.

MR. JONES: And how much time do we have?

THE COURT: You have 17 minutes left.

MR. JONES: Seventeen?

THE COURT: Yes.

MR. JONES: Thank you.

THE COURT: Almost 18.

MR. JONES: Thank you so much.

Everybody's got to have a board today. I'm only going to get one, though.

May it please the Court.

Ladies and Gentlemen of the Jury, thank you very much. I join everybody else in thanking you. We thank you for your time. We thank you for your service. We truly appreciate it.

Mr. Ward said that we admit that we owe $23 million for infringing FaceTime. That is not correct.

We admit we owe $23 million with regard to VO -- VPN on Demand. That's what we admit. The issue of whether or not FaceTime infringes is in your hands.

Now, the damages question in this case is what I'm going to talk about.

Can we go to Slide 1?

This is the question that you will be asked: What sum of money did VirnetX prove by a preponderance of the evidence would fairly and reasonably compensate VirnetX for Apple's infringement by VPN on Demand and infringement, if any, by FaceTime?

You are to apply the Court's instructions, you are to look at the evidence, and you are to answer that question. That's what you're being asked to do in this case with regard to damages.

Now, both experts have agreed on two things.

The first thing they've agreed on is that the same rate applies whether or not the two patents that we admit are infringed is all that's infringed, or whether the four patents, all four patents are found by you to infringe. So both experts admit the same rate applies.

And both experts have told you in their calculations that this is the most important evidence you should consider. These six licenses, this shows you the amounts paid under the licenses. This shows you the applicable units with Microsoft, that's U.S. only, and then this is the per-unit rate that was calculated by Mr. Weinstein, calculated by Mr. Weinstein. The only rate, though, that's disputed is the 19 cents. And we'll get to that in just a minute.

So they agreed on the important evidence you should look at. And, you know, it's not surprising, because if you would look at the Court's charge or the Court's instructions, they'll give you --

If we'll go to Slide 3.

-- which is going to be part of 6.3 of your jury

instruction, you'll find this paragraph beginning on Page 13.

The Court says that if you choose to rely on license agreements -- and both of these experts have and they suggested to you that you should -- then the Court tells you what you need to do when you rely on them.

And he says you must account for any differences between those licenses and the hypothetical negotiation question in this case between VirnetX and Apple when you make your reasonable royalty determination.

And then he tells you what are the key differences that you need to look at. And Mr. Ward has already looked at one of them, but I want to look at some others that you need to look at when you consider those licenses and apply them.

And if we could go to Slide 4.

And the first thing he tells you is you need to consider the type of technology involved and how it compares to what's in question in this case. Well, at question in this case, we have phones like this, iPads, and Mac computers.

Now, with regard to the Aastra license, what do we have?

Can you show us, Mr. Loy?

That's what we have, we have a desk phone, it's an intelligent phone used by some businesses.

With regard to the NI -- NEC license, again, we're

supposed to compare it to this. What do we have there?

Another desk phone, intelligent phone.

Siemens, what do we have, what kind of products are we talking about with that license? Compared to this.

Mitel, how does that technology compare if we -- if we do what the Court tells us to do? Again, another desk phone used by businesses and intelligent phone.

Okay. Then let's go to Avaya, what do we got there? We have another desk phone. And down here for the first time we see a pad. Remember, iPads are involved, so we're getting closer. The technology here is very different. We're getting a little closer there.

And when we get to Microsoft, what are we looking at what when we compare the technology that we're talking about? That's what we're talking about in license -- this is what we're talking about here.

Finally, bingo, we get something that's comparable. And the Court's told us we're supposed to look at comparable technology.

So when we look at that determination, that's what we see.

The next thing the Court has told us we can look at is when the license was entered into.

If we could go to Slide 6.

And we see here that when the licenses were entered

into, we look at the date, the closest in time, it's the Microsoft agreement, the one on the top of our chart.

If we go to Slide 7, the next thing we -- the Court says we can consider is the financial or economic conditions of the parties at the time the parties entered into the license.

Now, Mr. Ward just talked about that. Boy, we've heard a lot of evidence about that. Attorneys can confuse things. I think we've confused it.

If we could, let's go to Slide 8, because I'd like to do a little timeline on the evidence.

If you recall, we went through with Mr. Larsen a talk about what was the financial condition of this corporation at various times? And what we found was that on August the 13th, 2009, there was an investor call. And on that investor call, he said we're in a strong position with regard to Microsoft.

And he also said with regard to Microsoft --

Slide 9, can we bring that up?

-- that we're not going to do any small deals. He said, obviously, we're not going to settle for small licensing deals just to get one done quickly because that would, in fact, be a benchmark in the context of our Microsoft damages calculations. He said we're not going to do that. So that's that first date.

Then the next date that comes up --

If we could go back to our timeline.

-- is a date you'll all remember, the 8-K filing, and that's when they file things. And they said we're going to give bonuses, we're going to give raises, and we're going to give stock options.

Now, Mr. Ward has said, oh, oh, but that's unfair because that was filed on February 24, and then on March the 30th, 2010, things changed with a 10-K security filing. When that was filed, it showed, oh, things were bad and we were in trouble.

But if we could, let's look at that security filing. What does that security filing really deal with?

Let's go to Slide 8.

No, excuse me, let's go to Slide 12. I read it wrong.

This security filing was filed by VirnetX on March the 30th, 2010. But it says right here when you look at the highlighted portion that it's dealing with the year 2009. So when it discusses the financial condition of the corporation, it's not discussing what's going on in 2010. It's discussing is what's going on in 2009.

And what you see here when you put it in context --

If we could go back to the timeline.

-- is what we see here when we put it in context is

that the reason he got the raise, and the 8-K filing says this, is because he had raised cash. He had done two good private equity offerings. The corporation was doing better; and since it was doing better in 2010, he got the raise, the CFO got the raise, and got -- got the other compensation.

THE COURT: Mr. Jones, you have ten minutes remaining.

MR. JONES: Okay. What we see here reflected is that things had improved.

Next, the Court tells us -- if we could go to Slide 13 -- that we need to consider the number of patents involved in the license.

Now, there's been a lot of criticism here about looking at the number of patents involved in the license.

But like, for example, with this Microsoft license, when we look at it, there are 160 -- excuse me, 186 patents that were licensed in this agreement.

Now, the Court didn't tell you look at the patents-in-suit. The Court doesn't tell you look only at two patent families that happen to be in suit. No, the Court says, look at all the licenses -- excuse me, look at all the patents that apply to the license agreement. And that was 186 with regard to Microsoft. That's what Microsoft wanted, and that's what they got.

Mr. Weinstein disregards all but two of these. He

just throws them away. Don't believe your lying eyes when you look at all these. There are only two that matter. But that's not what Microsoft bought. And the Court says you have to consider that and put that in perspective.

If we could go to Slide 16?

The Court also says we have to consider whether or not the license covered foreign rights. Again, the Microsoft license, the one that the technology is close to, it included foreign rights. There were worldwide coverage here. When he calculates this unit rate, he only looks at the U.S. sales.

He totally discounts -- he totally discounts the other sales when he considers this agreement. That's not what the agreement said.

Again, you'll have it. It's Plaintiffs' Exhibit 1084 in front of you. And your eyes will tell you, it's a worldwide agreement. And he admitted that the unit figure, when you consider it's worldwide, is 2 billion. And he admitted that the per-unit rate then would be 10 cents per unit. And the Court tells you to consider that.

Let's move on. The Court says you may also consider the extent to which litigation may have affected -- excuse me, the extent to which litigation may have affected the licenses.

Let's go to Slide 19?

Here it is. The extent to which litigation --

litigation may have affected the licenses. What does this mean? This means that every one of these licenses was the settlement of lawsuits.

Now, you have heard that to defend a patent lawsuit like this costs millions of dollars. Everybody has agreed with that. So Aastra, for example, they had a choice. Do they spend millions or do they pay that amount? NEC, same choice, spend millions, pay 46,000? Siemens, spend millions, pay 55,000. Mitel, spend millions, pay 450. Avaya today paid that. They contend that Avaya is going to be a total of $10 million in the future with all the payments that are put together, but they had that decision to make.

What does that tell you? That tells you that it was a business decision, that these were settled for cost of -- these lower ones because it made more sense to pay that money than to fight out the litigation. And that's what they tell you. And don't just take my word for it because the general counsel of Avaya's deposition was taken in this case.

And look what he said -- if we could go to Slide 20, he said this, what -- with respect to Aastra's position, he said in our opinion, we didn't infringe the patents. From the beginning, we asserted that. From our view, any settlement that was less than the cost to go to trial was open for discussion. That's what happened.

And if you look at this, you could see that with

regard to these four down here, the ones that Mr. Weinstein says are most important, they're all within the range -- the cost of these settlements. The only two that are not, we have effective royalty ranges of 19 cents by Mr. Weinstein and 34 cents by Avaya.

Moving on, what else does the Court tell us we must consider? The Court tells us that we are looking at key differences. We -- we must compare what is going on with regard to the license for this product with what's going on in these agreements and account for those differences.

And when you do that, when you compare those and when you account for those differences, you have to ask yourselves the questions, why -- why on earth would Apple pay in 2009 an agreement for 302 million for 250 million units when Microsoft paid 223 million for 2 billion units?

Could we go to Slide 21?

What we see here is Microsoft licensed 2 billion units. They paid 200 million. Then they paid 23 million more. Why is it so much more? Their damages period goes on for 20 years. The damages period you're only looking at is four years. That's why they paid so much more. And that's why when you look at the correct figure, it is 10 cents, and that tells you everything you need to know.

It's just not reasonable that Apple would pay for only 250 million units, so much more than Microsoft would pay

for 2 billion units.

Now, what is fair? I think what is fair is clearly that we are tied to the agreements we are most like. It really is the Microsoft agreement. And the per-unit rate Mr. Weinstein says is 19 cents; but if you look at worldwide, it's 10 cents.

And when you look at that, the figure you come up with when you look at the approximate unit figures -- if we could go to Slide 22 -- excuse me, if we could go to Slide 24?

What we see when we make those calculations is 250 million units. The approximate units times 10 cents would be 25 million. If you use the 19 cents, it would be 250 million -- and the approximate -- excuse me, it would be 47,500 -- $47,500,000. Those are the two figures you see.

The other figure you might look at -- the only other one that's even close to applicable is the 24-cent figure. These figures are just so different that when you apply the Court's factors, they really just don't apply at all in this case due to the nature of them.

Now, Ladies and Gentlemen of the Jury, I want to close by talking about an issue that has percolated through this case from the very, very beginning. And that is Apple's failure to call witnesses.

On voir dire, Mr. Ward brought it up. First thing

he did. You know, I asked you on voir dire, I said, you know, are you going to hold it against Apple, are you going to be mad at them because they don't bring their own employees here to testify? That's why I asked it.

Now, Mr. Bakewell took the stand, our first witness, and the first thing he did was ask him about that. And he led off a list of names Frank Casanova, Joe Abuan, Mark Buckley. He said all these people have been deposed, and you've reviewed their depositions. And he said: Why aren't they here at trial?

Well, Ladies and Gentlemen of the Jury, I'm going to tell you, there have been a lot of depositions in this case.

VirnetX has requested and taken the deposition of 24 employees of Apple in this case. There have been hours upon hours of deposition. There are literally hundreds of pages of deposition testimony from Apple employees under oath. They've had the opportunity to question Apple employees over and over and over again in this case.

Over 800,000 pages of sworn testimony of our employees are in the record in this case by way of depositions. They've had every opportunity to talk to Apple employees.

Now, how much of that have they played to you? I don't think even 30 minutes of it. Not even 30 minutes of

it. Think about that. They complain that they haven't had a witness here, yet they've had 24 people to depose for hours and days and hundreds of thousands of pages of transcripts.

You know, Dr. Blaze explained that even Mr. -- Dr. Jones didn't disagree with the way our employees said our products operated. They don't disagree about that. You know, they have had every opportunity to get anything they needed from our witnesses.

Let me leave you with this question: Don't you know in all the hours and days of deposition testimony of those 24 different employees, if one of them had said, hey, these products are anonymous, you would have heard about it? They would have played it to you. They've had all kinds of opportunity to question Apple witnesses. And they played what they played. And it was very little.

You know, we could have been here for weeks listening to all that testimony. But luckily, we stuck with what were the disputed issues in this case.

Ladies and Gentlemen of the Jury, I wish you God speed in your deliberations. I thank you for your time again.

MR. CALDWELL: Your Honor, how much time do I have?

THE COURT: Have you 18-and-a-half minutes, but I gave Mr. Jones a little extra time, so I might give you a minute, too.

MR. CALDWELL: Will you give me a minute to get organized?

THE COURT: I certainly will.

MR. CALDWELL: Thank you.

Your Honor, may I proceed?

THE COURT: You may.

MR. CALDWELL: Ladies and Gentlemen of the Jury, thank you a lot for your patience with all of the lawyers. I suspect you don't like watching lawyers get up here and argue. You probably don't like watching the fact witnesses argue, but it's real important that we come to you.

And we present arguments to you. And the witnesses present evidence to you because one of the things you saw in that charge is that you were to be the judge of the credibility of those witnesses.

And Mr. Ward has already made the point about what you can see when somebody is sitting in that witness stand, and you can look at them and you see them cross-examined in front of a jury of eight people and a Judge.

I don't know if you can tell from these little clips how one of these depositions goes, but Mr. Curry and I or Dr. Jones will fly out to someplace in California, and we go to a lawyer's office, and we sit in the room with a table like this and ask the person questions. There's no judge that's sitting there keeping them in line. There's no jury

that's watching their reaction and keeping them in check. It doesn't happen. That's why we have trials in front of juries. It's the reason we're here.

Now, I can't go through everything that was just said to you that's just not true, and that's -- we have a limited amount of time.

But let me just point out something. When Mr. Arovas gets up here and the first thing he does is he starts off with how blown away that -- that my colleague, Mr. Ward, got up here and said, I'm surprised to see that Dr. Blaze challenged anonymity.

What we're surprised by is that he completely changed his anonymity theory today. I played for you this clip of us asking him questions after his report came out when we asked him what he thinks is involved in anonymity. And he says it's hiding those internal IP addresses. That was his theory.

And we come in today and his theory is, wait a minute, yeah, yeah, you're right, those are hidden, we don't send them, you can't detect those, you can't figure out who it is in the hotel or the office building that's talking. And you have -- that's enough for anonymity to hide one person.

But today he has decided that those internal IP addresses don't matter, and now it's just the public IP

addresses that matter, and those have to be encrypted.

Guys, you've seen the evidence. You know this can't be true. First of all, we know FaceTime is specifically designed to provide the information to allow these communications that hide the IP addresses.

Can I see Slide 192?

We know that the NAT hide a person's private IP address.

FaceTime built -- the FaceTime team specifically built a server called comNAT, specifically built it to make these calls go across these NATs. They went out of its way to support FaceTime calls originating behind a NAT, terminating behind a NAT. That's right. There are features in FaceTime intended to do that. Because they specifically developed the comNAT server to do it. That's right.

And then, perhaps the most shocking thing, is I'm asking him, wait, you admit this is anonymous, and it's not anonymous with the NAT.

This is a different version of the slide even that has the -- that has the router here. But the original version of the slide I showed you today, I showed you both of them. The other version of the slide I showed you was literally if we changed the box from a VPN server to a NAT, suddenly there's not anonymity versus something you already know provides the exact same anonymity of these patents.

It's just not credible. And that's why you're here, to resolve these sorts of issues.

Apple's lawyer argues, well, you know, surely somewhere in these depositions somebody would have admitted that there's anonymity if there's anonymity. And do you think these people just walk into the deposition and -- without preparing beforehand, and just walk into the deposition and answer our questions?

I mean, just take a minute and look at the folks in this courtroom, and do you think that what Apple's witnesses -- whether it's the paid experts or their fact witnesses, do you think for a minute that what they say during the pendency of this lawsuit is not very carefully cultivated? And now I'm supposed to walk in and, gosh, if we infringe there must have been some sort of admission they could have shown you.

Look at the lawyers in this courtroom. Does that make any sense to you?

Now, briefly, there was a reference to a jury question on tracking, and I don't know if this was an attempt to sort of confuse or whatnot. Most of us have seen these sort of websites where you're browsing Yahoo mail, you're reading an article, and then something kind of comes up in line, and what I see is, I see a Dallas Cowboy jersey because I got one for my little boy, right? Since I was searching

for Cowboy's jerseys, what do you know, I start getting a bunch of ads that are about Cowboy's jerseys.

That has nothing to do with someone knowing your IP address and sending an IP -- something to your IP address, knowing who you are, knowing what you're interested in. Nothing whatsoever.

As Dr. Jones explained after the question, those are a result of tracking cookies. Because if you don't change that setting on your website -- which, by the way, that paragraph we've never seen in trial said nothing about IP addresses. If you don't change that setting in your browser, your browser actually receives a little piece of code that it runs each time you go back to those websites.

And it updates what you've -- it updates the websites on what it is you've been searching for so they can pull ads, show them to you, and they get paid for showing you those ads. It has not one thing to do with knowing who was associated with an IP address.

So ask yourself, why would Apple present that argument in closing arguments in this case talking about whether FaceTime provides anonymity?

And, frankly, if it was all about whether cookies defeat anonymity, do you think we would be here in this trial? Do you think the parties would have spent the millions of dollars and fought for six years over a setting

that's in the website like that? Does it even make sense to you that Apple is making that argument to you?

One thing that Mr. Ward said, I think it was pretty telling, he asked: I wonder if we'll see Apple apologize for infringing?

And I think because we've heard Apple speak to you for the last time, we know the answer to that question.

They started infringing seven years ago, and they've still not told Dr. Short, hey, good job on that invention. Sorry, we infringe. Still didn't hear it.

And, you know, you can have different perspectives on this idea of bringing witnesses. Apple argues, well, we don't bring witnesses because your contracts are -- are confidential; but you know what, they've been using it in open Court for years.

And more to the point, most of the confidential documents -- remember when they made Dr. Short stand up and scoot on out the door? Most of the confidential documents we've seen in this case are Apple confidential documents that their engineers could see. Their engineers could take the stand, and they could let myself, Mr. Cassady, Mr. Curry, Mr. Ward cross-examine them and ask about statements they've made, but they chose not to.

Just ask yourself. You've seen lots of evidence on IP addresses -- probably more than you ever hope to. What

you've heard is that Apple is convinced it doesn't infringe on FaceTime because if a hacker intercepts that FaceTime packet, he can see the public Internet source and destination IP address.

Did you catch that I asked Dr. Blaze, it's hard to get slides -- I cross-examined him probably two hours ago.

Did you see I asked Dr. Blaze: Isn't it true that there is that kind of publicly routable Internet address in the clear on every single patent -- I'm sorry, every single packet sent across the Internet -- every single one? He agreed.

And then I said: Even on the anonymous ones? And he said: Yes, that's true.

So as a result of Apple switching its theories, and let's pretend these internal private IPs that actually do identify a specific machine within the network, let's pretend those don't matter. Let's focus on the ones in the -- out in the public Internet. They back themselves into this corner where they present to you a completely nonsensical argument, because we know the packets don't even get from the iPhone to the VPN server in VPN on Demand that we know infringes, if they don't have those IP addresses in the clear so that all those routers that are out on the Internet that are in these non-descript beige buildings that we don't even see, that bounce packets around on the Internet, the packets don't get

where they're going if those addresses are not out in the clear.

So ask yourself, is Apple's new theory that the necessary IP addresses must be encrypted or hidden, is that new theory logical? And how do you reconcile that with the fact that we know VPN on Demand infringes?

I'd like to talk to you a little bit about -- about damages.

Another thing that the instructions told you was that you need to take into account the financial or economic conditions of the parties at the time the parties entered into a license.

And it is absolutely true that in March of 2010, there is a 10-K that's reporting on 2009. It also deals with events from 2010 and is signed March 2010.

Plus, Mr. Larsen told you that they were incurring very extensive expenses at that point in time between March and between when the deal was done with Microsoft. That's completely unrebutted. Nobody even disputes it. It's absolutely true.

So speaking of smoke -- smoke screens and trying to get you to look the wrong way, who's trying to get you to look the wrong way? There is no dispute that VirnetX was in dire straits. They signed a deal for $200 million.

But one of the weirdest things that we heard in

this trial about that $200 million is that Mr. Bakewell said he's really surprised the VirnetX stock went up when they publicly announced that Microsoft had validated the technology and infused the company with $200 million. Does that make sense to anybody?

But there's another thing that's real different about the Microsoft situation and the situation you've got here. And, that is, remember that when you go back to award damages -- and we all know -- like I said from Day 1, this is an unusual case. You know you're awarding damages. When you go back to award damages, there's a big, big additional reason it's different than Microsoft.

You think Microsoft was just rolling over and saying, yeah, this stuff is valid and infringed? Well, if Microsoft was rolling over saying it's valid and infringed, why was the company bleeding money on Microsoft litigation back then?

But in the hypothetical negotiation you've got to consider -- it's in the instructions -- when you're figuring out of the differences between any of those licenses and the one that you've got to work on, you have to take into account whether they were assuming infringement, validity, which they were not, and the fact that you are.

So in your hypothetical negotiation, Apple walks in and is not making these arguments, these new arguments, these

strange arguments about whether 200 million is a good thing. They're just saying, yeah, we do it. We're infringing. It's valid. That's the context in which this hypothetical negotiation occurs.

You know, this actions speak louder than words -- one thing that's certain to happen if you're a trial lawyer and you use a saying, you can guarantee the other side will grab it and try and make it their own. One thing that I just don't want to get lost is, remember, we walked in here knowing VPN on Demand infringes. Apple knows VPN on Demand infringes.

Why is it when they were about to ask their customers how important that feature is, did someone dive in and say, whoa, stop, let's erase that question from the survey? Don't ask that one. Why is that? Ask yourself.

We've heard a lot about this hypothetical negotiation. You know, I just -- something just occurred to me watching this whole -- this whole trial.

Mr. Diaz, will you put that slide up, 196?

Guys -- Mr. Larsen, will you stand up? You guys met Mr. Larsen, and you remember there was some discussion about whether he would stay in the courtroom. He is fortunately allowed to be back here the rest of the day.

Thank you, sir.

Dr. Short, please stand up.

Those are the guys sitting on that side of this table. Who's sitting at the other end of that table for Apple in this hypothetical negotiation? Have you met them? Do you have any reason whatsoever to believe that they're going to have the kind of resolve that Kendall Larsen and Dr. Bob Short have after pursuing this since 1999?

Ladies and Gentlemen, my time is almost up, and I'll leave you with this: First of all, obviously I want to thank you on behalf of Mr. Larsen and his wife and Dr. Short and his wife, my colleagues, our whole team, thank you very much. We know it's hard work. It's late on a Friday, and I don't envy the position that you're in.

But I'll leave you with this: You know, just after this, the only folks that are Apple employees that you've seen are a couple of lawyers sitting in the back. And at some point when your verdict is read, they're going to make a call back to the office.

How is that call going to go? Is that call going to be: Well, it worked; we were able to convince the jury to think that the 200-million-dollar license was a bad thing, take the lowest possible interpretation based on sales of Windows software in New Zealand in the year 2020, convince the jury that that's comparable to the sale of an infringing iPhone or iPad with FaceTime, and walk out of here for pennies on the dollar? Or is that call going to say: You

know what, the jury got it right?

Ladies and Gentlemen, thank you for all your effort. We look forward to your verdict.

THE COURT: Ladies and Gentlemen of the Jury, it is now time for you to retire to the jury room to begin your deliberations. You will take with you the Court's final charge, as well as one copy of the verdict form. And the exhibits which have been admitted into evidence will be provided to you shortly.

The first thing you should do, of course, is to select your foreperson and then begin your deliberations.

As I told you earlier, if you recess during your deliberations, please follow all of the instructions that I have previously given you about your conduct during the trial.

Once again, if you want to communicate with me at all at any time during your deliberations, please give a written message or a question to Ms. Mayes, the Court Security Officer, who will bring it directly to me.

There are sheets that will be provided for you in that regard. I will respond as quickly as I can, either in writing or by having you brought into the courtroom to provide you an oral answer. And I will always, of course, disclose your question and my response to the attorneys before answering.

It's now time for you to retire for your deliberations.

COURT SECURITY OFFICER: All rise for the jury.

(Jury out for deliberations.)

THE COURT: Okay. I would ask that each side -- I'm -- before everybody scatters, please make sure you leave somebody from your team in the courtroom, okay? Thank you.

(Recess.)

(Jury out.)

THE COURT: Okay. We're on the record. It's 6:20. We've got a note dated today, timed at 6:15 p.m. It's Jury Note No. 2. The first note indicated that the jury foreperson is Mr. Place, I think.

Jury Note No. 2 says they need the evidence boards with the red-colored checkmarks from the Plaintiff and the board from the Defendant with the X marks.

Now, my policy has been on this that unless the parties agree, demonstratives don't go back to the jury. I'm happy to allow it if you-all are agreeable to it, but you're going to have to agree to it.

MR. JONES: Could we consult just for a second?

THE COURT: Yeah, and you can read the note yourself if you want.

MR. AROVAS: No, that's all it says right here.

MR. CALDWELL: Can I read it?

THE COURT: Okay.
(Off the record discussion.)
THE COURT: Let's go back on the record.
Go ahead.
MR. AROVAS: We -- from Apple's perspective, we're fine with these particular demonstratives. Obviously, we want to take demonstratives up one-by-one if they ask --
THE COURT: Yes, yes.
MR. AROVAS: For these particular ones, it's fine.
MR. CALDWELL: Sure. We're fine with these -- these particular checkmarks and the X boards.
THE COURT: Okay. We'll provide that. So --
MR. AROVAS: We have them here.
THE COURT: Does VirnetX have theirs here?
MR. CALDWELL: Yes, Your Honor.
THE COURT: All right.
MR. CASSADY: Thank you, Your Honor.
THE COURT: All right. How many is it?
MR. JONES: We have two, Your Honor.
THE COURT: Okay.
MR. PEARSON: Seven, Your Honor, for the Plaintiff.
THE COURT: Seven -- seven from the Plaintiff.
MR. CALDWELL: Seven from the Plaintiff and two for them.
THE COURT: Okay. Are we agreed --

MR. CALDWELL: Do you want us to carry it close by?
THE COURT: Are we agreed that's the ones the jury is referring to?
MR. CALDWELL: I don't think there's any dispute to these --
MR. AROVAS: Seems to be.
THE COURT: Are we good?
MR. CASSADY: I think we're good.
MR. CALDWELL: Yeah.
THE COURT: All right. Ms. Mayes, you want to just take them back?
MR. CASSADY: We're going to put them close, but we won't take them in.
THE COURT: Don't take them in, please.
MR. AROVAS: Your Honor?
THE COURT: Yes.
MR. AROVAS: Can I just be heard?
THE COURT: Yeah.
MR. AROVAS: Is it -- is it okay to raise a different issue, something --
THE COURT: Yeah, let's wait until she gets in the door.
Okay.
MR. AROVAS: So I just want to -- we had talked yesterday about the issue of the jury consultant.

THE COURT: Right.

MR. AROVAS: I had thought that yesterday we had provided the informal discovery that the Court expected us to provide. Then we just got an email today starting more discussions over discovery, and I don't really want to drag this out.

I had thought we had complied with what we were supposed to comply with, and I wasn't sure if the Court had some expectation while we're all together as to what we were supposed to be doing, or if there was some procedure that people had in mind, but we had viewed that we had complied.

We provided that nonprivileged information on the record in the conference.

MR. CASSADY: Your Honor, with regards to the conversations we had yesterday on the record, many of those answers, even in that hearing, changed from counsel for Apple.

So we asked questions about how certain they were about their investigation they had done, and we asked other questions that came from the fact that, for instance, they said Mr. Larsen's cross outline had been sent to Bloom. They did not yet know whether or not any comments came back or they were -- discussed any with him.

The problem we've got is we're still just information-disadvantaged. So what I would say is, Your

Honor, we're not moving. Obviously, that comes with its own ramifications, but we do believe some formal discovery is probably going to be necessary on this issue.

THE COURT: Formal?

MR. CASSADY: Yeah. But we hope that formal discovery leads to not having any problems. But I -- I can't waive an issue for my client without the full information of that understanding. So that's -- that's what I can tell the Court right now.

THE COURT: Right. I understand. I -- I mean, you've made your record about it. As I said yesterday, I don't think there's anything I can do particularly to fix this at the present time.

I understand you're not asking for a mistrial. I understand you're not asking for -- for Kirkland & Ellis to be disqualified as this point. You've sought some information, some information has been provided, perhaps not everything that -- that you believe, at least, you need to -- you need in order to be able to properly advise your client and put your client in a position of making a fully informed decision.

Whatever the law of waiver is on this issue, obviously is something that we may ultimately have to -- to take up and to consider, but I'm certainly not in a position to -- to, you know, do anything further at this time.

I think the ball is in your court more or less, Mr. Cassady, on behalf of your client in terms of what further information you need from Apple on this, and I don't -- have you sent a letter, or is there some further communication?

MR. CASSADY: There's further email communications. Your Honor, I'll tell you what my plan is, it is to continue to try and meet and confer about what we should get.

And if that breaks down, and I'm hoping it's not broken down yet, then we may move the Court for additional relief about the discovery.

But, again, as I said yesterday, I mean it from the bottom of my heart, this is a serious issue, I take it very personally, I know Mr. Bloom personally.

THE COURT: Right.

MR. CASSADY: I just want to be able to advise my client that they're not in a bad spot, so...

THE COURT: Yeah, no, certainly I understand that.

And certainly all the representations Mr. Arovas has made to the Court, you know, on behalf of his client, I obviously take at face value, as I know you do, too, as I know you do, as well.

So, you know, to the extent you need any additional information to resolve this, I encourage you, Mr. Arovas, to comply with that.

MR. AROVAS: Yeah.

THE COURT: Provide that information.

MR. AROVAS: Yeah, okay, so -- thank you, Your Honor.

I wanted to make sure there was nothing the Court was expecting us to do that we had not done because I had made commitments to the Court to --

THE COURT: I've not been asked to --

MR. AROVAS: Yeah, yeah, yeah.

THE COURT: -- provide relief to anyone.

MR. AROVAS: Yeah, yeah, okay. Thank you, Your Honor.

THE COURT: Thank you, Your Honor.

(Recess.)

THE COURT: Okay. Note No. 3, although it's not indicated as such, it is the third note, and they're asking for the charts depicting the dollar amounts all companies paid VirnetX.

MR. JONES: I guess they're talking about the one I put up.

MR. AROVAS: Yeah, it was a big board of --

THE COURT: They're probably talking about the one you put up and used in closing.

MR. CASSADY: Well, it could be talking -- Roy's says the same thing, but we can send both back. They have

the same information on them. Let me look at them.

MR. JONES: Yeah.

THE COURT: You want to pull them?

MR. AROVAS: Yeah, yeah.

THE COURT: No, y'all confer, and I'll give you a couple of -- not too long, though, okay?

MR. AROVAS: Couple minutes, Your Honor.

THE COURT: Yeah.

MR. CASSADY: Can I hear that again one more time, Your Honor?

THE COURT: Yeah. Need charts depicting dollar amounts all companies paid VirnetX.

MR. CASSADY: That actually -- I just wanted to note I think there's a little bit of ambiguity there. We have the ones that show per units Kendall Larsen showed how much they paid overall. We'll confer about that, but I just wanted to put that on the record.

(Recess.)

THE COURT: Okay. So we're back on the record.

The parties have met and conferred and have agreed to send back the demonstratives, what was --

MR. AROVAS: PX --

THE COURT: -- PX --

MR. AROVAS: -- 1088.3 --

THE COURT: Okay.

MR. AROVAS: -- and a board labeled No. 61 that was used in closing.

THE COURT: And it was Apple's closing board?

MR. AROVAS: Yes.

THE COURT: Okay. All right. And that's agreed, right?

MR. CASSADY: Yes, Your Honor.

THE COURT: All right. Very good.

(Recess.)

COURT SECURITY OFFICER: All rise.

THE COURT: Okay. Anything before we have the jury brought in?

Ms. Mayes.

(Jury in.)

THE COURT: Please be seated.

Mr. Place, I understand you've been selected by the jury to be the jury foreperson; is that correct?

THE FOREPERSON: Yes, sir, I have.

THE COURT: All right. Has the jury reached a verdict?

THE FOREPERSON: Yes, sir, we have.

THE COURT: Is the verdict unanimous?

THE FOREPERSON: Yes, sir, it is.

THE COURT: All right. I'm going to ask that you hand the verdict to Ms. Mayes.

Okay. I'm going to hand the verdict back to Mrs. Schroeder, our Courtroom Deputy, and I'm going to ask that she read it.

And I would request that the members of the jury pay very close attention to Mrs. Schroeder as she is reading the verdict because I'm going to ask you at the -- at the end of the reading of the verdict whether it was the decision of each of you, in that you're -- in other words, was your decision unanimous.

So, Mrs. Schroeder, if you would read the verdict.

COURTROOM DEPUTY: Question No. 1. Did VirnetX prove by a preponderance of the evidence that Apple's FaceTime infringed any of the following claims of VirnetX's '504 and '211 patents?

'504 patent:

Claim 1, yes.

Claim 2, yes.

Claim 5, yes.

Claim 27, yes.

The '211 patent:

Claim 36, yes.

Claim 47, yes.

Claim 51, yes.

What sum of money did VirnetX prove by a preponderance of the evidence would fairly and reasonably

compensate VirnetX for Apple's infringement by VPN on Demand and infringement, if any, by FaceTime?

$302,427,950.

THE COURT: All right. Ladies and Gentlemen, all of you who voted for this verdict, would you please stand?

(All jurors stood.)

THE COURT: All right. Very well.

Let the record reflect that all eight jurors stood. And the verdict --

You may be seated.

The verdict, of course, will be filed by the Clerk of the Court either later this evening or -- or early on Monday morning.

Ladies and Gentlemen, you are now about to be dismissed. And I dismiss you with the thanks of the Court and the attorneys and the parties who have submitted this dispute to you.

I told you at the beginning of this trial on Monday morning that I firmly believed that jury service is one of the most important forms of public service that you can render to your country; and by being here and participating as you have throughout this week, your careful attention, your hard work and patience with the Court and the attorneys, you have -- you have done us all a great service, and you have done your duty as citizens to preserve, protect, and

defend the Constitution of the United States and the rights that are guaranteed to all of us by virtue of the Constitution, and, of course, in particular the right to the trial by jury as part of the Bill of Rights.

So on behalf of the parties and the attorneys and the United States District Court for the Eastern District of Texas, I hope you will accept my profound appreciation for your hard work and your service.

I would ask at this time for you to go back to the jury room, someone will be there shortly to dismiss you.

The -- after you leave the courthouse, of course, you're certainly free to -- to speak with anyone you want to, but I have asked the attorneys and will ask the attorneys not to initiate any conversation with you, and so they should not be contacting you. And, of course, I would let -- I would ask you to let me know if that occurs.

With those comments, again, I appreciate your -- your service and your hard work, and you all can go back to the jury room.

COURT SECURITY OFFICER: All rise for the jury.

(Jury out.)

THE COURT: Okay. You all can be seated.

I expect that the verdict will be filed, Mrs. Schroeder, tonight or first thing on Monday morning.

I do expect the -- the transcript to be completed,

Ms. Holmes, over the weekend perhaps, early next week.

Okay. I would -- I don't know what the parties' thoughts are. My suggestion is post-trial motions and briefing -- opening briefs perhaps be due, say, 14 days after the transcript has been filed with -- with responses due 14 days after that. Replies seven days after that and sur-replies seven days after that.

To the extent the parties want to meet and confer and propose an alternate schedule, I'm certainly open to doing that as well. But just preliminarily, those are sort of what my thoughts are, as well.

I also would be open to the parties meeting and conferring on, you know, a reasonable extension on the page limits, as well, if you think that's necessary.

Mr. Caldwell?

MR. CALDWELL: Your Honor, we were actually -- we were actually going to stand up and request something fairly expedited under the circumstances. So we're totally on-board with that proposal, the schedule that you laid out.

THE COURT: Well, again, you all visit, and, you know, if there's something that's slightly different that accommodates other concerns that I may not be aware of, I'm certainly open to an alternative schedule.

I -- the only other thing I want to do is to congratulate the counsel and to compliment all of you on the

tremendous work and effort that each of you put into trying this case.

I know that I've observed and I know how much work has gone into doing everything you can to represent your clients to the very best ability, and I've seen that throughout this trial by all of you. So I do appreciate your hard work, and I appreciate your cooperation, and I do appreciate your professionalism.

So unless there's anything further, we'll be in recess.

COURT SECURITY OFFICER: All rise.

(Court adjourned.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of our abilities.

/s/_____
SHELLY HOLMES, CSR, TCRR September 30, 2016
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/16

/s/_____
SHEA SLOAN, CSR, RPR
Official Court Reporter
State of Texas No.: 3081
Expiration Date: 12/31/16